No. 15873

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. McFARLAND, APPELLEES

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. McFARLAND, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court for the Southern District of California, Northern Division

BRIEF FOR THE UNITED STATES AS APPELLEE

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Assistant Attorney General,

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CITATIONS

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BRIEF FOR THE UNITED STATES AS APPELLEE

This brief is filed in answer to "Appellants' Opening Brief" filed by defendants. In their brief as appellants, defendants attack the judgment below on two grounds: First, they argue that this suit

for civil damages under Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1635, is barred by the five year statute of limitations 28 U.S.C. 2462. Secondly, they argue that the district court's finding of fraud is not supported by the evidence. This brief will meet both contentions.[1]

STATEMENT OF THE CASE

The Government instituted this suit under the fraud provisions of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611 *et seq.* to recover civil damages arising from the defendants' fraudulent acquisition of surplus property in violation of the Act. The substance of the charge is that defendant E. B. Hougham, individually and doing business as Baker's Motor Market, used each of the other defendants [2] as front men to purchase for him with their veteran's priority certificates surplus-property vehicles to which Hougham was not otherwise entitled. After a full trial, the district court found that the defendants were guilty of fraud as charged (R. 105-114) and that the action was not barred by the statute of limitations relied upon, because that statute was not applicable to actions under

[1] The Government has filed a separate brief as appellant urging that the district court, in determining the quantum of damages, erred in limiting the Government's recovery to $8000.00.

[2] Owen Dailey, William E. Schwartze. and Harlan L. McFarland.

the Surplus Property Act (R. 47, 117-118).[3]

Each of the veteran-defendants filed with the War Assets Administration an application for a veteran's priority certificate to enable him to purchase war surplus material on a priority basis [4] (R. 127-130, R. 206-209, R. 218-220, R. 227-228). On the basis of the representations in these applications, priority certificates in varying amounts were issued to each of the veterans enabling them to purchase surplus property at sales all over the country on a priority basis. Each of these applications described an established business (R. 127, 207, 219, 227) and in each the veteran represented and certified that

> I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; * * * *that said property is to be used in and as part of the enterprise described herein.* (Emphasis supplied.) (R. 208, 219, 228).[5]

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[3] The district court initially held that the statute of limitations found in 28 U.S.C. 2462 was applicable to actions under Section 26(b) of the Surplus Property Act, but that this action was nevertheless timely (R. 44-45). However, it later revised this ruling and held that no statute of limitations was applicable to this action. (R. 47).

[4] Harlan L. McFarland filed two applications.

[5] The certification signed by Owen Dailey was in substance the same, but in wording somewhat different:

I certify:

* * * *

That the property applied for is the initial stock,

The district court concluded "from all of the evidence that as far as any enterprise of these three men it was purely synthetic * * * [T]hese men were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt he could use in his business" (R. 443). The testimony on which this conclusion is based my be summarized as follows:

OWEN DAILEY

Owen Dailey had been a representative of Firestone Tire and Rubber Company before the war (R. 166). When he was released from the service on June 27, 1946 (R. 128), he accepted a position as manager of defendant Hougham's used car lot which was styled Baker's Motor Market (R. 134). Dailey's salary was $400.00 per month (R. 134). On July 29, 1946, Dailey made his application for a veteran's priority certificate (R. 134), and thereafter from July 31, 1946 to September 30, 1946, purchased with this certificate $13,671.02 worth of surplus-property vehicles (R. 107, 61).

In his certificate Dailey represented, in addition to the matters mentioned above, that he was the only individual "financially interested" in the enterprise (R. 127) and that his working capital was "$35,000.00—Personal Fund, Bank of America" (R. 128).

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necessary to establish or maintain the enterprise described herein, * * *

* * * *

That I am not purchasing the property described herein for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal. (R. 129).

At the trial, he admitted that at the time of the application his personal account was "probably in the red" (R. 188) and that a letter of financial responsibility from the Bank of America which he submitted to the War Assets Administration (R. 132) was supplied to him by Hougham and signed by a bank vice president whom Dailey had never seen before or since (R. 187-188). In a statement to the F.B.I., Dailey admitted that the funds for his purchases were "entirely supplied by Baker's Motor Market to whom I executed bills of sale for each item as it was purchased" (R. 135). For each of the items which Dailey thus "sold" to Hougham, Dailey was paid $10 (R. 178, 188-189). Mr. Hougham referred to this $10 payment as a "buying fee" (R. 380) or "buyer's fee" (R. 383). All of the items purchased on Dailey's priority were disposed of by Baker's Motor Market (R. 135).

The vehicles, which Dailey maintained were his own, were delivered to Baker's Motor Market, where, according to Dailey, he had arranged for storage (R. 171). Hougham made no storage charge (R. 181). The vehicles, once delivered, were repaired, often by other employees of Baker's Motor Market (R. 180). No records were kept of these repairs and no charge was made for them (R. 180-181). Parts were taken from the stock of Baker's Motor Market to repair "Dailey's vehicles" without charge (R. 180). When one of "Dailey's vehicles" needed glass work, this was done by another shop in Bakersfield (R. 182-183). The bill was paid by Baker's Motor Market (R. 183). Finally, Dailey testified that no interest

was charged on the purported loan to finance his purchase and that the loan itself was not evidenced by a writing (R. 176-177, 190). When Dailey wished to make a veteran's priority purchase, Hougham simply gave him the cash or Dailey got the cash from the bank on Hougham's instructions (R. 174-175). Despite the fact that Dailey testified that he was interested in operating his own business in vehicles available to the public and that Hougham was in the same situation, Dailey told the court that there was no competition between the two men (R. 200-201).

On the basis of this testimony the district court concluded that Hougham and Dailey "entered into agreements with one another to use Owen Dailey's veteran's priority certificate to obtain surplus property for E. B. Hougham from the War Assets Administration" (R. 107).

HARLAN L. McFARLAND

The pattern established by the testimony with respect to Dailey was in large part repeated in the case of defendants McFarland and Schwartze.

Harlan L. McFarland made two applications for veteran's priority certificates, one in March 1946, the other in July 1946 (R. 218-220, 226-227). Both contained the certifications quoted above, *supra* p. 3. On the basis of these applications, McFarland purchased from March 21, 1946, to September 16, 1946, $27,710.51 worth of surplus-property vehicles (R. 112-113, 71).

On the second of these applications, McFarland

listed his business address as "McFarland Motors, 2401 East 14th St., Oakland Alameda Calif." (R. 227). McFarland testified that he never conducted a business at that address, knew no one at that address and had no intention of conducting a business in Oakland at all (R. 333). McFarland acknowledged that the false address entry was in his handwriting (R. 352-353)[6]. Yet McFarland had no explanation as to where he got the address. (There was, in addition, a San Francisco address listed in McFarland's handwriting that had been crossed out (R. 227). McFarland had no explanation for this address either (R. 331-332).) It should be noted at this point that the other veteran-defendant William Schwartze also had a false San Francisco address on his application which he testified was given to him by Hougham (R. 286); see *infra*, p. 9.

The enterprise described in McFarland's application was McFarland Motors. There had been a McFarland Motors in the thirties operated first by McFarland's mother and brother and then by McFarland and his mother (R. 222). During the war how-

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[6] Q. [by Mr. Conron] * * * I don't suppose you have any independent recollection right now, this minute, as to whether or not you personally did make that entry in that application with your own hand, do you? Independent recollection?

A. [by Mr. McFarland] It looks like my writing.

Q. Do you have any independent recollection?

A. No.

Q. Now listen to my questions and answer them. (R. 352-353).

ever, the business remained inactive (R. 223).

The arrangements Hougham had with McFarland were similar to those with Dailey. According to Hougham, he supplied McFarland with all the capital to make the purchases listed in the complaint (R. 378). It would appear from McFarland's testimony that McFarland made some other purchases with his own capital (R. 317, 318). Apparently, McFarland retained the vehicles he purchased with his own capital and sold them from his lot (R. 317). On the vehicles purchased with Hougham's capital (and this includes all the vehicles listed in the complaint (R. 378)), the vehicles would be delivered to Baker's Motor Market and McFarland would be paid his $10 (R. 317). This $10 fee was paid by Hougham on each vehicle regardless of the condition of the vehicle or the resale price by Hougham (R. 342, 372, 384-385). Moreover, McFarland and Hougham together went over catalogs of war surplus material offered at these sales to determine which ones should be purchased by McFarland (R. 346). Hougham also paid McFarland's expenses when attending war surplus sales (R. 339).

In a sworn statement McFarland admitted that "I was doing him [Hougham] a favor by acting as his buyer at these sales" (R. 223). At the trial where McFarland was defending his actions on the basis of their being bona fide sales to Hougham, McFarland admitted that in the case of 25 particular units, he had resold them to Hougham prior to his own purchase (R. 322).

As in the case of Dailey, McFarland paid no in-

terest on the purported loan and no written records were kept of the transaction (R. 316).

The district court concluded that Hougham and McFarland "entered into agreements with one another to use Harlan L. McFarland's veteran's priority certificate to obtain surplus property for E. B. Hougham from the War Assets Administration" (R. 112).

WILLIAM E. SCHWARTZE

William E. Schwartze's application for a veteran's priority certificate was made on March 20, 1946 (R. 206-208). On the basis of this application, he received a veteran's priority certificate which enabled him to purchase $38,131.13 worth of surplus property on a priority basis (R. 110, 64-65).

On his application, Schwartze listed the address of his truck rental business as "525 Jones St., San Francisco" (R. 207). Schwartze testified that he got the address from Hougham, but that he had never heard of it otherwise (R. 286). Hougham testified from a picture of 525 Jones Street that it looked like a garage in which he used to park repossessions in the 20's and 30's (R. 409). Schwartze never operated a business at that address or a truck rental business at all (R. 299).

Schwartze was Hougham's stepson and as such he had an open drawing account at Baker's Motor Market on which he drew for his needs and his wants (R. 285). In addition, he had the use of Hougham's charge accounts, both personal and business (R. 285). In view of this arrangement, Schwartze was not paid

the usual $10 commission paid to Dailey and McFarland (R. 302-303).

All of Schwartze's war surplus purchases were financed by Hougham (R. 390). Delivery of the vehicles was made to Baker's Motor Market (R. 293). Every vehicle which Schwartze purchased was disposed of through Baker's Motor Market (R. 393). All the profit on the sale of the vehicles went to Baker's Motor Market (R. 394). All expenses for repairs were borne by Baker's Motor Market (R. 293-294, 394). Schwartze's expenses on buying trips were paid by Hougham (R. 294). Mr. Hougham admitted that Schwartze had no share in the profits of the business and was not regarded as a partner (R. 390). The agreement with him was that, in Hougham's own words, "He bought surplus at veterans' priority sales for our business" (R. 390).

Schwartze's explanation for his actions was that he had intended to go into the truck rental business with the surplus property he purchased, but that after his purchase he discovered that the trucks were wider than was allowed on California highways (R. 306-308). Accordingly, Schwartze disposed of the vehicles to Hougham. However, Schwartze offered no explanation as to why he did not purchase other surplus trucks that were not too wide after disposing of the others to Hougham. Moreover, he admitted that many of the vehicles, such as five bomb carrier trailers and a one and one-half ton 1940 Dodge truck were not purchased for the truck rental business, but for Baker's Motor Market (R. 296-299).

The district court concluded that Hougham and

Schwartze "entered into agreements with one another to use William E. Schwartze's veteran's priority certificate to obtain surplus property for Hougham from the War Assets Administration" (R. 109).

STATUTES INVOLVED

1. The pertinent provisions of Section 26 of the Surplus Property Act of 1944 are set forth at pages 6-7 of the "Brief for the United States as Appellant".

2. 28 U.S.C. 2462 provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

ARGUMENT

I

The District Court's Findings Of Fact That The Defendants Were Guilty Of Fraud Are Not Clearly Erroneous

A. *Scope of Review: The "Clearly Erroneous" Rule.*

This Court need not be reminded of its limited function in reviewing a district court's findings of fact. The effect of the "clearly erroneous" rule, Rule 52(a), F.R.C.P., has been too often treated by this [7]

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[7] *General Casulty Co.* v. *School District No. 5*, 233 F. 2d 526 (C.A. 9); *Barry* v. *Lawrence Warehouse Co.*, 190 F. 2d

and other courts to warrant further exposition here. Suffice it to say that the Rule's additional admonition that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" is peculiarly applicable to a fraud case of this sort, where the demeanor of witnesses may be crucial to the outcome, but is nevertheless inevitably lost in the pages of a printed record. As Mr. Justice Jackson has written, "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341.

B. ***The findings of fraud are not clearly erroneous because they are supported by substantial evidence.***

With a summary of the evidence before the court as well as a statement of the scope of review, little more need be said. The conclusion below—if not compelled—can by no stretch of the imagination be characterized as clearly erroneous.

The facts present the standard elements in the typical veteran's front fraud—the purchase of large amounts of surplus property by inpecunious veterans with money supplied by Hougham, Hougham's failure to charge interest on the loan, failure to evidence the transactions by written documents, Hougham's payment of the veterans' expenses at the sales, immediate delivery of the property to Hougham, repairs made to the property by Hougham without charge, disposal of all the property by Hougham after a pur-

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433 (C.A. 9); *West* v. *Conrad,* 182 F. 2d 255 (C.A. 9); *United States* v. *Fotopulos,* 180 F. 2d 631 (C.A. 9); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.,* 178 F. 2d 541 (C.A. 9).

ported sale to him, and finally payment to the veterans of a $10 "buying fee" for each vehicle delivered regardless of the cost of the vehicle to the veteran, regardless of the condition of the vehicle, and regardless of the amount for which the vehicle was later sold by Hougham. It would be impossible, we submit, for the Government in any case to present to a court more compelling evidence of fraud than was adduced here.

In a case under this same Act which presents similar evidence to that in the case at bar—supplying of money to a veteran, false statements on application, veteran accompanied to sale by non-veteran, immediate "resale" by veteran to non-veteran—this Court reversed a district court finding of no fraud as clearly erroneous. *United States* v. *Comstock Extension Mining Co.*, 214 F. 2d 400 (C.A. 9).

Moreover, the Fifth Circuit recently affirmed a finding of fraud under this Act evidenced only by a fraction of the badges of fraud present here, *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5), certiorari denied, 352 U.S. 971. The court in *Daniel* quoted approvingly from the district judge's oral opinion (234 F. 2d at 105):

> "The fact that witnesses testified that the defendant Daniel furnished the money and was working with each of the witnesses, and put up the money to purchase, and in one instance, at least, went with the purchaser when he did purchase, and each of these purchasers were veterans entitled to purchase government property at a lower scale than anyone else could purchase

it; under that state of facts I believe that the defendant Daniel knew that these veterans were going to get these certificates and to use them in the purchase of this property. It is almost an insult to one's ability to connect testimony and to discover where the truth lies to make any other conclusion. He put up the money. He got the things that were purchased. He knew they were veterans. And, as I have already said, in at least one instance went with him down there where the sales were made to the veterans.

* * * *

"I, therefore, conclude, as a matter of law that judgment must go for the plaintiff."

Bernstein v. *United States*, Nos. 5704 and 5705, decided May 23, 1958 (C.A. 10)[8] is also factually close to the case at bar, although in *Bernstein* the proof of fraud was in many respects weaker than in the instant case, for there the purported loans and sales were evidenced by elaborate documents, the War Assets Administration was advised of the purported sale by the veteran, and only one veteran was used rather than establishing a pattern as was done here and in the *Daniel* case, *supra*, p. 13. But in many respects the *Bernstein* case presents the same elements as in the instant case such as the use of an employee and the presence of misstatements on the application form. Moreover, the same defenses urged in the instant case were relied on unsuccessfully in *Bernstein*:

[8] The opinion in the *Bernstein* case is printed as an appendix to the Government's brief as appellant in this case.

> * * * [A]ppellants earnestly insist that Bensik purchased the property in his own right for his own account; that the subsequent sale of a major portion of it to Bernstein Brothers was not prohibited by any applicable regulation * * *. In other words, the sale was "real and not a sham", hence without fraud or actionable wrongdoing.

After noting that "it would undoubtedly be contrary to the spirit and purpose of the Surplus Property Act and actionably wrong, to use Bensik's priority to obtain the property on behalf and for the benefit of Bernstein Brothers", the Tenth Circuit concluded:

> * * * In determining in the last analysis whether Bensik purchased the heaters for his own account as an established dealer for resale, or as a mere broker or agent for Bernstein Brothers, it is significant to note that the gain he realized from the 510 heaters is more like a broker's commission than an established dealer's legitimate profit.
>
> When the evidence is considered in its entirety, we are certainly unable to say that the inferences which the trial court drew from the established facts were unwarranted, and that its judgment thereon is clearly erroneous.

It is submitted that the same conclusion is called for here. In the light of the overwhelming evidence of fraud outlined above, it cannot seriously be argued that the district court's findings will leave this Court with a "definite and firm conviction that a mistake has been committed". *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395.

II

The District Court Correctly Decided That The Action Is Not Barred By 28 U.S.C. 2462 Because That Statute Of Limitations Is Not Applicable To Suits Under Section 26 Of The Surplus Property Act

Defendants argue that this action is barred by the five-year statute of limitations found in 28 U.S.C. 2462, *supra*, p. 11. However, that statute applies only to a "civil fine, penalty, or forfeiture". It is now well-settled that the statute has no application to civil actions under Section 26(b) of the Surplus Property Act because the recovery permitted by Section 26 is not penal but civil, providing the Government with alternative measures of liquidated damages.

The character of the recovery under Section 26(b) of the Surplus Property Act was before the Supreme Court in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151, where the Court held that " * * * the recovery [under Section 26(b)(1)] is civil in nature. The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property rights, it may resort to the same remedies as a private person * * * Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations."

Although the question as to whether Section 26 (b)(1) was civil or penal in nature did not arise in *Rex Trailer* in the context of the applicability of the statute of limitations, it is clear from the manner in which the case reached the Supreme Court that the

Court regarded 26(b) as civil for purposes of the application of 28 U.S.C. 2462. In *Rex Trailer* the defendant had pleaded *nolo contendere* in a prior criminal proceeding based on the same transactions for which he was now being sued under Section 26 (b) of the statute. He argued that the later proceeding under 26(b) placed him twice in jeopardy in violation of the Fifth Amendment. This of course depended on whether the later action was civil or penal in nature. The Court noted in its opinion that certiorari was granted "to resolve an asserted conflict between the decisions of the Courts of Appeals" (350 U.S. at 149). In a footnote to this sentence the Court stated:

> In considering whether the statute of limitations contained in 28 USC §2462 applied to §26 (b)(1) of the Surplus Property Act, the Fifth Circuit held §26(b)(1) to be a civil remedy in United States v. Weaver (Ala.) 207 F 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon (Tenn.) 211 F. 2d 858. [350 U.S. at 149.]

In holding that the recovery was civil in nature for double jeopardy purposes it is clear that the Court also disapproved the decision of the Sixth Circuit in the *Witherspoon* case which held 26(b)(1) penal for statute of limitations purposes.

The defendants in their brief in the instant case rely on the *Witherspoon* case as their primary authority (Defendants' brief as appellants, p. 8), yet nowhere do they cite or discuss the effect of the *Rex Trailer* case on *Witherspoon* despite the fact that

the district court based its decision in the instant case on *Rex Trailer* (R. 44-47).

The Supreme Court in *Rex Trailer* also made it clear that subsections (2) and (3) as well as subsection (1) of 26(b) are civil in nature: "All three [of the remedies under Section 26(b)] were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose." 350 U.S. at 151-2.

In a very recent decision squarely in point on this aspect of the case, the Court of Appeals for the Third Circuit, relying on the reasoning outlined above, has flatly ruled that the damage provisions of Section 26(b) of the Surplus Property Act are not penal in nature and that the five-year limitation statute is therefore inapplicable. (*United States* v. *Doman*, (C.A. 3), Nos. 12,371 and 12,372, decided June 17, 1958; this opinion is reproduced in an appendix to this brief for the Court's convenience.) The Third Circuit in *Doman*, stated: "We are of the opinion that Section 26(b)(1) does not provide for a penalty but is remedial in nature." See also *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537; *United States* v. *Barish*, No. 12,395, decided June 18, 1958 (C.A. 3) (The precise question as in the *Doman* case was raised and the court disposed of it *per curiam* on the basis of *Doman*); *United States* v. *Schneider*, 139 F. Supp. 826 (D.C.S.D.N.Y.). But cf. *Erie Basin Metal Products, Inc.* v. *United States*, 150 F. Supp. 561 (C. Cls.)

It is also significant here that *Doman* makes it plain that the holding of non-applicability of any statute of limitations to suits by the Government under the Surplus Property Act applies with equal force irrespective of the particular subsection of Section 26(b) under which the Government seeks damages:

> Moreover, it should be noted that Section 26 (b) contains three subsections. The latter two clearly provide for multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia.*

The Third Circuit's decision that the statute of limitations in 28 U.S.C. 2462 is not applicable to suits under Section 26(b) of the Surplus Property Act is, we submit, undoubtedly correct and should be followed here. 28 U.S.C. 2462, accordingly, is no bar to the present action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed with respect to the defendants' appeal.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,371

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

RAYMOND JEREAN KOLLER,

Appellant.

No. 12,372

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

MARTIN SILVERBROOK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 19, 1958

Before BIGGS, *Chief Judge*, and GOODRICH and MCLAUGHLIN, *Circuit Judges*

OPINION OF THE COURT

(Filed June 17, 1958)

BY BIGGS, Chief Judge.

The two appeals at bar, arise out of a single case in the court below, and may be appropriately disposed of in a single opinion. This civil suit was instituted against the defendants under Section 26(b) (1) of the Surplus Property Act of 1944 [1] to recover the sum of $2,000 and double damages for each of several fraudulent transactions alleged to have been engaged in by the defendants.

The United States filed motions for summary judgment against each of the defendants. Set out in the motions, as their bases, were indictments handed down against Koller and Silverbrook and others, alleging violations of Title 18, USC, 1940 ed. § 80 (Mar. 4, 1909) C. 321 § 35, 35 Stat. 1095. The asserted violations were that Koller and Silverbrook and others had engaged in a fraud upon the United States by filing false applications for priority in the

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[1] Act of October 3, 1944, ch. 479, 58 Stat. 765 as amended, repealed, and reenacted as of June 30, 1949, ch. 288, Title II, Section 209, 63 Stat. 392, 40 U.S.C. § 489.

purchase of property of the United States and were the identical acts alleged in the complaint in the present civil action. Both Koller and Silverbrook had pleaded guilty to the indictments and had been fined. The court below in the instant case correctly found that the pleas of guilty entered by Koller and Silverbrook in the criminal case referred to conclusively established the issue of fraud against them in the case at bar. On August 7, 1957 the court below entered judgment against both Koller and Silverbrook and the appeals at bar followed.

The acts complained of were committed by Silverbrook on March 15, 1946 and by Koller on July 12, 1945 and June 3, 1946. The complaint in the instant case was filed on May 12, 1955, more than nine years after the completion of the acts complained of. While the general rule is that the statute of limitations ordinarily does not run against the United States, United States v. Summerlin, 310 U.S. 414 (1940), where the action brought by the United States is for the enforcement of a civil fine, penalty, or forfeiture, the statute of limitations is five years.[2] The narrow issue, therefore, is whether Section 26(b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silverbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. § 2462.

The United States, relying upon the opinion of the Supreme Court in Rex Trailer Co. v. United States, 350 U.S. 148 (1956), argues that the Surplus Property Act does not impose a civil fine, a penalty or a forfeiture and therefore the statute of limitations set forth in Section 2462, 28 U.S.C., does not bar suit on the claims before this court. Koller and Silverbrook contend that Section 26(b)(1) does impose a civil penalty and since the decision of the Supreme Court in Rex Trailer did not deal with the statute of limitations issue it affords no authority for the determination of the issue at bar. We cannot agree with defendants' contentions.

In Rex Trailer the Supreme Court had before it the issue of whether the Rex Trailer Company, which had pleaded *nolle contendere* to a charge of fraudulently purchasing motor vehicles under the Act, and had been fined in that criminal proceeding, was subjected to double jeopardy when sued by the United States in a civil action under Section 26(b)(1) to recover $2,000 for each prohibited act, the acts complained of being those set out in the indictment in the criminal case. The court held in substance that the recovery sought under Section 26(b)(1) was civil in nature and did not put the Trailer Company in jeopardy in violation of the Fifth Amendment.

The principal question presented for decision in Rex Trailer v. United States was stated to be whether the provisions of Section 26(b)(1) are civil or criminal. While the issue in Rex Trailer was one of double jeopardy, the Court, 350 U.S. at p. 149, stated that certiorari was granted to resolve an asserted conflict between the decisions of the Courts of Appeals. In footnote 2 it stated, "In considering whether the statute of limitations contained in 28 U.S.C. § 2462 applied to § 26(b)(1) of the Surplus Property

Act the Fifth Circuit held § 26(b)(1) to be a civil remedy in United States v. Weaver, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858."

In holding that Section 26(b)(1) of the Surplus Property Act created a statutory right in the United States to recover liquidated damages which were thought by the Court to be reasonable, we believe that the Court intended to put at rest the "asserted" conflict between the circuits. See United States v. Hougham, 148 F. Supp. 715 (S.D. Cal. 1957); United States v. Schneider, 139 F. Supp. 826 (S.D. N.Y. 1956); dissenting opinion of Judge Madden in Erie Basin Metal Products, Inc. v. United States, 150 F. Supp. 561, 566-7. But see the majority opinion in Erie Metal Products v. United States, *supra*.

We are of the opinion that Section 26(b)(1) does not provide for a penalty but is remedial in nature. We are buttressed in this view by the opinion of the Supreme Court in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). This case involved an action under the False Claims Act, 31 U.S.C.A. § 231, which contained language similar to that in Section 26(b)(1) of the Surplus Property Act. It provides that a person who commits certain frauds upon the United States ". . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount of damages which the United States may have sustained. . . ." The Court held that this provision for the recovery of $2,000 and double damages for each fraud was a compensatory civil remedy and therefore was remedial in nature. The Court stated, 317 U.S. at p. 551, "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and

that the device of double damages plus a specific sum was chosen to make sure the government would be made completely whole."

The opinion in Marcus v. Hess was handed down on January 18, 1943. The Surplus Property Act, which employed virtually identical language, was enacted on October 3, 1944. As Mr. Justice Clark stated in footnote 4 cited to the text at 350 U.S. at p. 152, of Rex Trailer, "Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

Moreover, it should be noted that Section 26(b) contains three subsections.[3] The latter two clearly

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[3] Section 26(b) of the Surplus Property Act, Title 40 U.S.C. §489 provides as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States, or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> "(1) shall pay to the United States the sum of $2,000. for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> "(2) shall, if the United States shall so elect, pay to the United States, as *liquidated damages,* a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or
>
> "(3) shall, if the United States shall so elect, restore to the United States the property thus secured and

provide for multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia.* We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

The fact that Section 26(b) (1) allows for the recovery of $2,000 in addition to the double damages does not make that section punitive. In Helvering v. Mitchell, 303 U.S. 391 (1938) a 50% assessment upon those who committed fraud under the Revenue Act of 1928 was not considered a penalty, but rather was held to be a civil administrative sanction of a remedial nature. See Scadron's Estate v. Commissioner, 212 F. 2d 188 (2 Cir. 1954), cert. den. 348 U.S. 832 (1954); Kirk v. Commissioner, 179 F. 2d 619 (1 Cir. 1950); Reimer's Estate v. Commissioner, 180 F. 2d 159 (6 Cir. 1950).

The nature of the recovery is not altered by the inability of the United States in the case at bar to show actual damage, since, as was held in Rex Trailer Co., the remedy provided by 26 (b) (1) is comparable to a recovery under a liquidated damage provision

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obtained and the United States shall retain as *liquidated damages* any consideration given to the United States or any Government agency for such property." (Emphasis added.)

which fixes compensation for anticipated loss. That the United States had a legitimate proprietary interest in insuring the disposal of its surplus materials to veterans in accordance with the announced policy and objectives of the Surplus Property Act, and that it suffered compensable damage under the statute by defendants' manifest perversion of that policy are propositions which have been settled beyond the need for further review. Rex Trailer Co. v. United States, *supra;* United States v. Bound Brook Hospital, 251 F. 2d 12 (3 Cir. 1958); Daniel v. United States, 234 F. 2d 102 (5 Cir. 1956).

We conclude that Section 26(b)(1) provides for compensatory damages, and that the statute of limitations, Section 2462, 28 U.S.C., did not bar this action in the court below. The judgment of the court below will be affirmed.

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